IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 33 OF 2004

Shri Bapusaheb Baburao Shedge ... Appellant

V/s

Smt. Laxmibai Manohar Lokhande
(since deceased through L.R.s)
Sou. Kamal Rajaram Mithar & ors. ... Respondents

Mr. A.V. Anturkar with Mr.S.P. Pawar for the appellant.

Mr. P.D. Dalvi for the respondent No.1-H.

CORAM: P.V. KAKADE, J.
DATED: 15TH SEPT., 2005

P.C.:

1. Rule. Rule made returnable forthwith by consent.

2. Heard learned counsel for the appellant as well as respondent No.1-H. Remaining respondents are served but not appeared.

3. The present suit was filed by the plaintiffs for possession of encroached area admeasuring 20 Ares and for consequential reliefs.

4. The learned Trial Judge after recording the evidence

and hearing both parties, came to the conclusion that the suit was liable to be dismissed as the encroachment was not proved.

The appeal was carried to the District Court, Satara. The learned Addl. District Judge, after hearing both parties allowed the appeal and directed the defendants to hand over possession of the encroached portion shown in the map Exh.77.

5. In the course of the argument, learned counsel for the appellants brought to my notice the statement made by the learned lower appellate Court to the effect as follows :-

> "..... there is no difficulty to arrive at a conclusion regarding the factum of the encroachment and I have arrived at positive conclusion about the factum of encroachment and so far as the extent of encroachment is concerned, this can be carried out at the time of execution of the decree."

The counsel for the appellants has taken strong exception to this statement on the ground that it was the lower appellate Court which is last Court of fact who was required to determine and record the findings

regarding the extent of encroachment also and it cannot be left to the execution Court to decide the extent of encroachment once the factum of encroachment was proved. Without further elaboration, I am of the view that it is a fit case to remand the matter to the lower appellate Court to record its clear cut finding in respect of extent of encroachment also.

6. Hence the appeal is allowed.

The judgment and order passed by the Addl. District Judge, Satara, dated 19.9.2003 is hereby set aside and the matter is remanded to the Court of Addl. District Judge, Satara with direction that he shall also determine the extent of encroachment made by the defendants on the plaintiffs' property when he has already come to the conclusion that the factum of encroachment is proved on record.

The appeal to be heard on merits after giving due notice to both parties and to be disposed of within three months from the date of receipt of writ of this Court.

With this direction, the appeal stands disposed of with no order as to costs.

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